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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

CHARLES J. JOHNSON, Plaintiff and Appellant, v. CERTAINTEED CORPORATION, Defendant and Respondent.	A125234 (San Francisco City and County Super. Ct. No. CGC-08-274919)

Following a diagnosis of mesothelioma, a form of lung cancer, Charles J. Johnson filed a complaint against CertainTeed Corporation (CertainTeed) and other defendants for, among other claims, negligence and strict liability for product defect. With regard to CertainTeed, Johnson asserted that in the early 1960s he was a longshoreman at San Francisco piers and was injured while unpacking sacks of asbestos purchased by CertainTeed from an overseas company. The sacks of asbestos fiber were shipped F.O.B.[1] at the South African port and CertainTeed was to pay for the freight and insurance on the shipments of asbestos from South Africa.

CertainTeed moved for summary judgment against Johnson's pleading, and the trial court granted the motion. The lower court's order included a finding that Johnson presented no evidence that CertainTeed controlled or participated in any decision about the shipping and packaging of the asbestos and therefore he had no claim in tort against

[1] F.O.B. "means 'free on board[.]' " (Com. Code, § 2319, subd. (1).)

CertainTeed. Johnson appeals and contends that CertainTeed purchased the asbestos and was the owner of it when it was placed into the stream of commerce and, since the product had inadequate packages and warnings, CertainTeed is liable to him in negligence and under the doctrine of strict liability for product defect. We are not persuaded by his arguments and affirm the judgment.

BACKGROUND

Johnson, who is in his 70s, was diagnosed in October 2008 with mesothelioma, which was caused by exposure to asbestos. Mesothelioma is an incurable cancer.

On November 7, 2008, Johnson filed a first amended complaint against CertainTeed and others. Johnson set forth against CertainTeed causes of action for negligence, strict liability, and false representation and a claim for punitive damages. On April 10, 2009, CertainTeed moved for summary judgment or, in the alternative, summary adjudication of issues.

Evidence during discovery established that CertainTeed acquired an asbestos-cement pipe manufacturing plant in Santa Clara in June of 1962. It purchased the asbestos fibers mined in South Africa from Turners Asbestos Fibres Limited (Turners) pursuant to contracts that provided the shipments were to be shipped F.O.B. at the South African port. The contracts between Turners and CertainTeed provided that CertainTeed was to pay for the freight and insurance on the shipments of asbestos from South Africa. Some of the asbestos purchased by CertainTeed arrived on ships operated by Nedlloyd Shipping Lines (Nedlloyd). Harvey Edward Hamilton, the traffic manager for CertainTeed's Santa Clara plant from 1962 to 1978, arranged for the trucks owned and driven by Panella Drayage to haul the asbestos fiber from the San Francisco ports to the plant.

Johnson worked on and off as a longshoreman for Pacific Maritime Association at various piers in San Francisco from 1957 until 1963. He unloaded from Nedlloyd ships burlap sacks of asbestos that weighed approximately 120 pounds. Johnson did not wear any respiratory protection when he unloaded the sacks of asbestos and no one instructed

him to do so. The sacks did not have any warnings and they leaked and puffed out asbestos dust.

Lloyd C. Ambler, who worked at CertainTeed from February 1967 until December 2001 and who eventually became president of the pipe and plastics group at the company, declared that CertainTeed never owned or operated any type of asbestos mine. He also avowed that CertainTeed never owned or operated any pier or port in San Francisco and never employed any longshoremen to unload cargo from ships at any port or piers in San Francisco. CertainTeed also, according to Ambler, never directed or controlled the manner in which longshoremen unloaded cargo from such ships and did not have a contract with any company managing the unloading of cargo from ships at any ports or piers in San Francisco. Additionally, CertainTeed did not select the shipping company or control the means of transporting the raw fiber into the United States. Ambler also stated that Turners, the seller of the asbestos fiber, packaged the asbestos fiber.

Ambler testified that CertainTeed knew the following in 1962: "[A]sbestos could be harmful if a person was exposed to high levels of asbestos over long periods of time. In the mid sixties it became more common knowledge that you could contract cancer. Some of that was in conjunction with smoking. That carried on into the latter sixties, when there started to become more and more information more available on mesothelioma." Hamilton, the traffic manager for the Santa Clara plant of CertainTeed during the relevant time period, stated that he knew the longshoremen discharged bags filled with asbestos from the ships.

The trial court held a hearing on the motion for summary judgment on April 27, 2009. On May 11, 2009, the court granted CertainTeed's motion for summary judgment. The court explained: "In *Craine v. Oliver Chilled Plow Works* (9th Cir. 1922) 280 F. 954, on which [Johnson] relies, the defendant shipper controlled the decision to ship the product without guarding the blades or warning of the danger. The *Craine* court found that the plaintiff had stated a cause of action for negligence against the shipper of a product where the defendant had delivered the product to the carrier without warnings of

the dangers incidental to the handling of the machine, and the plaintiff was not informed of such dangers. [(*Id.* at p. 957.)] By contrast, [Johnson] has presented no evidence that CertainTeed controlled or participated in the decision how to ship the asbestos, how to package it, what labels or warnings to put on the packaging, or how to handle the packages. Thus, the foundation for imposing duty in *Craine* does not exist in this case. The court further finds that the transfer of commercial risk by virtue of the payment being F.O.B. is an insufficient substitute for possession and control in determining the existence of a duty to have packaged the material differently or to have warned. [Johnson] has cited no cases supporting the proposition that the F.O.B. provision may be used to create tort liability as alleged in this instance." The court concluded that Johnson failed to raise a triable issue of material fact that CertainTeed controlled the shipment of the asbestos fiber handled by Johnson, that CertainTeed owed a duty to Johnson, that CertainTeed breached a duty owed to Johnson, or that CertainTeed controlled the packaging of the asbestos to which Johnson was exposed.

Judgment was entered on May 21, 2009. Johnson filed a timely notice of appeal.

DISCUSSION

On appeal, Johnson challenges the lower court's ruling with regard to his negligence and strict liability claims. He does not address the dismissal of his false representation cause of action and has therefore forfeited any objection on appeal to the lower court's ruling on this claim.

I. *Standard of Review*

We review a trial court's grant of summary judgment de novo. (*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 388-389.) "In performing our de novo review, we must view the evidence in a light favorable to [the] plaintiff as the losing party [citation], liberally construing [his] evidentiary submission while strictly scrutinizing [the] defendant['s] own showing, and resolving any evidentiary doubts or ambiguities in [the] plaintiff's favor." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768-769.)

A defendant seeking summary judgment "bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) California law requires that "a defendant moving for summary judgment . . . present evidence, and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Id.* at p. 854, fn. omitted.)

II. *Negligence*

Johnson maintains that CertainTeed had a duty to protect handlers of the sacks of asbestos that it had purchased, and that it breached this duty when it purchased and shipped the sacks of asbestos to ports in San Francisco without ensuring that the sacks had adequate warnings and did not leak.

An action for negligence "requires a showing that the defendant owed the plaintiff a legal duty of care, that the defendant breached that duty, and that the breach caused the plaintiff injury." (*Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409, 1414.) The existence of a duty is a question of law to be decided by the court. (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 124, overruled on other grounds in *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 678.) For the reasons discussed below, we conclude that CertainTeed did not have a legal duty of care to Johnson.

A. *Duty to Use Ordinary Care*

"As a general rule, one owes no duty to control the conduct of another, nor to warn those endangered by such conduct." (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 203; see also *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 435.) However, each person has a duty to use ordinary care and is liable for injuries caused by the "failure to exercise reasonable care in the circumstances . . . ." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 112 (*Rowland*), superseded by statute on another issue.) Duty is simply a summation of the policy considerations supporting the conclusion that a

particular plaintiff is entitled to legal protection. (*Dillon v. Legg* (1968) 68 Cal.2d 728, 734.) "[T]he major [considerations] are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." (*Rowland, supra*, 69 Cal.2d at p. 113.)

With regard to the first two *Rowland* factors listed—foreseeability of harm to the plaintiff and the degree of certainty that the plaintiff suffered injury—Johnson presented evidence that CertainTeed knew that asbestos was dangerous and that Johnson has mesothelioma. Few of the other factors in *Rowland's* balancing test, however, favor a determination that CertainTeed had a legal duty to Johnson.

Most significantly, the record does not establish that there was the requisite close connection between CertainTeed's conduct and the injury suffered by Johnson. The parties dispute whether CertainTeed knew that the sacks leaked and the record does not indicate that CertainTeed knew that the longshoremen were not wearing protective gear. However, even if we presume that CertainTeed knew these facts, the record does not show that CertainTeed could have done anything to remedy these problems. Johnson testified that he took his work instructions solely from the Pacific Maritime Association and there is no evidence that CertainTeed had any relationship with or influence over the Pacific Maritime Association. Ambler, who worked at CertainTeed, testified that CertainTeed never employed any longshoremen to unload cargo from ships at piers in San Francisco and never directed or controlled the manner in which longshoremen unloaded the cargo. He further asserted that CertainTeed did not have a contract with any company managing the unloading of cargo from ships at any ports in San Francisco. Additionally, the evidence presented established that CertainTeed had no control over the packaging of the asbestos fiber or the warnings on the packages. Ambler testified that Turners packaged the asbestos fiber.

The abovementioned facts distinguish the case before us from the situation in *Craine v. Oliver Chilled Plow Works, supra,* 280 F. 954, the case upon which Johnson relied in the trial court. In *Craine,* the defendant was a shipper of a potato digger and the defendant placed the machine on the wharf for shipping. A person carrying the potato digger into the hold of the ship was injured because the machine contained knives and other sharp parts not covered, guarded, or removed. (*Id.* at p. 956.) The *Craine* court held that the shipper of the potato digger owed to the employees of a carrier the duty to exercise reasonable care to see that the implement was in a reasonably safe condition for handling by the employees of the carrier. (*Id.* at p. 959.) Thus, the defendant in *Craine,* unlike CertainTeed, was the party that packaged and shipped the product with a defect and therefore had direct control over the product causing the injury. In contrast, here, there is no evidence that CertainTeed had any influence or control over the packaging of the defective product or Johnson's work environment, and therefore the nexus between Johnson's injury and CertainTeed's conduct is tenuous.

Since the record before us contains no evidence that CertainTeed's conduct could have modified Johnson's work environment or made the packaging or the shipping of the asbestos fiber safer, we conclude that minimal moral blame can be attached to its conduct. Further, since CertainTeed lacked control in these critical areas, attaching liability to it would have minimal effect on advancing the policy of preventing future harm and would be burdensome to an entity that could do little, if anything, to avoid the harm. Indeed, if CertainTeed could be liable simply because it purchased asbestos, we would essentially be making a purchaser of asbestos strictly liable for the transport of the product from the seller to the purchaser even when it had no control over the methods or manner of transport.

Finally, it is true that insurance probably covers the risk to CertainTeed, but this is not a situation where there is likely to be no recourse for Johnson. He has potential claims against the companies that mined, packaged, or sold any asbestos fiber he handled

as well as against his employer.[2] Indeed, Johnson states in his opening brief filed in this court, "In the instant case the probability of negligence of Turner[s] in packaging the asbestos is almost absolute . . . ."

Johnson expounds at great length on the genesis of the negligence doctrine and complains that the lower court's determination that CertainTeed had no duty of care to him based on the facts that CertainTeed did not control the packaging or the shipment of the asbestos "begs the question" and is "backward" because the court "basically" found that "there was no 'duty' to protect the plaintiff because it didn't protect the plaintiff." The proper focus, according to Johnson, is on whether "the category of negligent conduct at issue, considering the general character of the event, is sufficiently likely to result in the kind of harm experienced, so that liability may be imposed." He further criticizes the lower court for disregarding facts he claimed indicated that CertainTeed was the legal owner of the asbestos at the time Johnson was exposed to the sacks of asbestos fiber. He stresses that the asbestos was shipped F.O.B. the place of shipment. Commercial Code section 2401, subdivision (2) provides, in relevant part, that "Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods . . . ." He acknowledges that ownership may not create a duty in itself, but he argues that this fact should be considered.

F.O.B. "is a delivery term[.]" (Com. Code, § 2319, subd. (1).) Bearing the risk of loss for a shipment does not necessarily mean legal ownership. However, even if we presume that CertainTeed was the legal owner of the asbestos or that the F.O.B. term in the contract between the merchants created an inference of legal ownership and we presume that CertainTeed knew that the sacks were leaking, these facts do not outweigh the consideration that there was little connection between CertainTeed's conduct and the injury to Johnson. The record does not contain evidence that CertainTeed could have

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[2] We express no opinion as to whether Johnson would prevail on claims for negligence against these parties. Rather, we merely point out that he has potential claims against them.

done anything to modify the packaging. Johnson repeatedly faults CertainTeed for "failing to demand safe packaging and failing to warn" and for not ordering from a different supplier. Undermining this argument, however, is the record; this record does not contain evidence that CertainTeed could have had some influence over Turners or could have found another viable seller that used safer packaging or sacks with warnings. Indeed, there is no evidence in this record that CertainTeed did not make such requests to Turners or that it did not search for other sellers of asbestos. Without any evidence that CertainTeed did not make such attempts or that such attempts would have made any difference, Johnson's assertions of wrongdoing are insufficient to create a legal duty.

In his argument section in his brief in this court, Johnson merely argues in a conclusory fashion that CertainTeed could have exerted influence over Turners and cites no evidence in the record in support of this assertion. In the portion of his brief setting forth the background facts, he does present facts he describes as showing CertainTeed's ability to influence Turners. However, he does not mention or cite to these facts in his argument. It is axiomatic that the appellant must support arguments with appropriate citations to the material facts in the record and if the appellant fails to do this, the argument is forfeited. (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.)

Although we could dismiss Johnson's argument for failing to support it with facts from the record, our consideration of these facts does not alter our conclusion that Johnson's argument lacks merit. In his statement of facts, Johnson claims that CertainTeed had a close and ongoing relationship with Turners and Johnson cites to the contracts between the two companies between 1962 through 1964. These contracts merely show that CertainTeed bought asbestos from Turners from 1962 through 1964, and nothing in the record indicates that CertainTeed was a major or even a significant purchaser; the contracts do not suggest or imply that CertainTeed had any influence over the packaging of the product being purchased. Johnson also cites as evidence of the close relationship between CertainTeed and Turners the purchase agreement between CertainTeed and Turner & Newall Limited (T&N) regarding CertainTeed's purchase of

the Santa Clara plant. Johnson states that this agreement establishes that Turners was instrumental in allowing CertainTeed to purchase its Santa Clara plant and that Turners was a holder, either directly or indirectly, of shares of common stock of CertainTeed.[3] It is unclear exactly what this agreement shows, but this agreement, without any further facts, does not raise any inference that CertainTeed had any control or influence over Turners's packaging of the asbestos.

B. *Duty Based on a Special Relationship*

Johnson also suggests that CertainTeed has a duty of care to him based on their special relationship. Johnson contends that CertainTeed had a special responsibility because its behavior involved an unreasonable danger to others. He maintains that, even if CertainTeed did not have any control over the packaging and shipping of the asbestos, "a reasonable person would not keep ordering a product, putting it in the stream of commerce, knowing that the product is extremely hazardous, and may kill people. At some point a reasonable person would either demand a change in the packaging or stop ordering from that supplier altogether, rather than putting foreseeable people at certain risk."

"Under traditional tort law principles, one is ordinarily not liable for the actions of another and is under no duty to protect another from harm, in the absence of a special relationship of custody or control." (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 293.) Before a special relationship can give rise to a duty of care, there must be an ability to control the third party causing the injury. (See, e.g., *Todd v. Dow* (1993) 19 Cal.App.4th 253, 259.)

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[3] The purchase agreement between T&N and CertainTeed specifies that T&N "is the beneficial owner of the whole of the issued share capital of Keasbey & Mattison Company" (Keasbey). It specified that T&N "intends to cause [Keasbey] to enter into an agreement with CertainTeed . . . ." This agreement included the following: CertainTeed "agrees that for as long as" T&N "shall directly or indirectly be the holder of not less than 250,000 shares of Common Stock of CertainTeed or 10 percent, of the total issued Common Stock of CertainTeed at any time whichever is the less CertainTeed will submit to its stockholders as nominees of the management for election to its Board of Directors two persons nominated by" T&N.

In the present case, CertainTeed did not mine, manufacture, or sell the asbestos that Johnson unloaded. Further, as already stressed, CertainTeed was not Johnson's employer, Johnson was not injured while on CertainTeed's premises, and Johnson was not in any way under CertainTeed's direction. As already emphasized, there is no evidence that CertainTeed had any control over the packaging or shipping of the asbestos from South Africa to San Francisco's piers. Further, the record contains no evidence indicating that another supplier was available; the record also contains no information on whether CertainTeed made any requests or demands to Turners to make the sacks containing asbestos fiber safer. Thus, Johnson has not set forth any feature that would create a special relationship and the critical factor necessary to create a special relationship—custody or control—is missing. (See, e.g., *Todd v. Dow, supra,* 19 Cal.App.4th at p. 259.)

Since we conclude that the lower court properly found no negligence based on a determination that CertainTeed did not have a legal duty to Johnson,[4] we need not consider CertainTeed's argument that there was no evidence that it knew the bags containing asbestos fiber leaked.

III. *Strict Liability*

Johnson argues that CertainTeed is liable under the doctrine of strict liability for product defect. He maintains that CertainTeed placed the defective product—inadequately packaged asbestos fibers—into the stream of commerce without adequate warnings.

A. *The Doctrine*

Liability for product defect, while strict, is not absolute. (*Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 994.) The application of strict liability in any particular factual setting is determined largely by the policies that underlie the

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[4] The parties debate whether Johnson is attempting to create new tort law by this action in negligence. We need not address these arguments because we conclude that, under well-established precedent and the *particular* facts in this record, CertainTeed has no legal duty to Johnson.

doctrine. (*Id.* at p. 995.) "The rules of products liability 'focus responsibility for defects, whether negligently or nonnegligently caused, on the manufacturer of the completed product.' " (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 478-479.)

California first developed the strict liability doctrine in *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57. The court held that "[a] manufacturer is strictly liable [to consumers] when an article [it] places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." (*Id.* at p. 62.) Under what is sometimes referred to as the "stream of commerce" doctrine, "strict liability may attach even if the defendant did not have actual possession of the defective product or control over the manner in which the product was designed or manufactured." (*Bay Summit Community Assn. v. Shell Oil Co.* (1996) 51 Cal.App.4th 762, 774 (*Bay Summit*).) This doctrine was extended to retailers in *Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 256 (*Vandermark*) because the Supreme Court concluded that retailers "are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products." (*Id.* at p. 262.) Subsequently, courts expanded the doctrine to include lessors of personal property (e.g., *Price v. Shell Oil Co.* (1970) 2 Cal.3d 245), developers of mass-produced homes (e.g., *Kriegler v. Eichler Homes, Inc.* (1969) 269 Cal.App.2d 224), and wholesale and retail distributors (e.g., *Barth v. B.F. Goodrich Tire Co.* (1968) 265 Cal.App.2d 228).

Currently, California's products liability doctrine "provides generally that manufacturers, retailers, and others in the marketing chain of a product are strictly liable in tort for personal injuries caused by a defective product." (*Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1188 (*Peterson*).) Although the doctrine is not limited to manufacturers or designers of the final product, liability only attaches to those who are "responsible for passing the product down the line to the consumer" or "play an integral role in the 'producing and marketing enterprise' of a defective product and profit from placing the product into the stream of commerce." (*Bay Summit, supra,* 51 Cal.App.4th at p. 773.) "Imposing strict liability under these circumstances is 'an expression of policy that once an entity is instrumental in placing a defective product . . . into the stream of

commerce, then liability' " should attach without regard to fault. (*Id.* at p. 773, citing *Kasel v. Remington Arms Co.* (1972) 24 Cal.App.3d 711, 733.)

"In applying this stream of commerce theory, the courts have eschewed legal labels and have taken a very practical approach, focusing on the actual connection between the defendant's activities and the defective product." (*Bay Summit, supra,* 51 Cal.App.4th at p. 774.) Courts, however, have "refused to hold a defendant strictly liable where the policy justifications are not applicable even if the defendant could be technically viewed as a 'link in the chain' in getting the product to the consumer market." (*Ibid.*) "The imposition of strict liability depends on whether the facts establish a sufficient causative relationship or connection between the defendant and the product so as to establish that the polices underlying the strict liability doctrine are satisfied." (*Id.* at p. 776.)

B. *Applying the Doctrine to the Present Case*

1. *When the Defendant is a Purchaser*

CertainTeed argues that no court has held that a purchaser of a product is strictly liable under the stream of commerce doctrine and cites *Monte Vista Development Corp. v. Superior Court* (1991) 226 Cal.App.3d 1681 (*Monte Vista*) as exemplifying a situation where the court rejected an attempt to impose strict liability on the purchaser of a product with a defect. It further points out that, here, Johnson was not a consumer of the product.

The court in *Monte Vista* did not suggest that a purchaser could *never* be held liable under strict liability for a product defect, but merely explained that no court had imposed liability "under the circumstances here presented." (*Monte Vista*, *supra*, 226 Cal.App.3d at p. 1688.) In *Monte Vista Development*, a plaintiff injured when a soap dish in her home broke sued the development corporation and the tile company that had installed the soap dish. The court concluded that the subcontractor was simply a purchaser of the soap dish, not in the business of selling soap dishes or any other fixtures, and was therefore not subject to strict liability for supplying a defective product. (*Id.* at pp. 1687-1688.)

CertainTeed argues in a conclusory fashion that the facts in *Monte Vista* are similar to the present case; we disagree. Here, in contrast to *Monte Vista*, the product purchased was inherently dangerous and CertainTeed had a continuing business relationship with the supplier. The *Monte Vista* court noted that it did not matter to the subcontractor who "supplied the tile fixtures." (*Monte Vista, supra,* 226 Cal.App.3d at p. 1688.) In the present case, the ongoing business relationship between Turners and CertainTeed raises an inference that it did matter to CertainTeed who supplied it with the asbestos fiber. We therefore are not prepared to make such a broad holding that a purchaser of a product cannot be subject to strict liability for a product defect, since there may be some situations where a purchaser of a product has or could have influence over the design or marketing of a product and therefore the policy considerations would be different.

Similarly, we are not willing to exempt CertainTeed from liability simply because Johnson was neither a consumer of the product nor an injured bystander. Again, there may be some unique factual situations that would support the policy of making the defendant liable when the injured party is not a consumer or an injured bystander.

2. *When the Defendant is a Purchaser with No Other Connection to the Injury*

We also reject Johnson's argument that, simply because CertainTeed purchased the asbestos and placed the defective product into the stream of commerce, it was liable. Every purchaser of a dangerous product causes the product to enter the stream of commerce simply by buying the product and, thus, every purchaser could be "technically viewed as a 'link in the chain' " (*Bay Summit, supra,* 51 Cal.App.4th at p. 774). Purchasing a defective product, however, is insufficient because "[a] significant common element running through the cases [of strict liability] is that each of the defendants against whom the standard of strict liability has been applied played an integral and vital part in the overall production or marketing enterprise. At the very least the defendant in each case was a link in the chain of getting goods from the manufacturer to the ultimate user or consumer." (*Silverhart v. Mount Zion Hospital* (1971) 20 Cal.App.3d 1022, 1026.) Just as an entity that simply promotes, endorses, or advertises a product is not

automatically held liable for a defect in the product (*Bay Summit*, at p. 776), a purchaser with no further connection to the marketing enterprise should not be automatically liable for any defect in the product. We therefore hold that, at a minimum, the injured plaintiff must present evidence connecting the purchaser with having the ability to influence the decision over how to distribute and market the product.

Here, as already discussed, not only was Johnson not a consumer of the product, there is no evidence that CertainTeed could or did have any control over the production and shipping of the asbestos. Without some evidence that CertainTeed could exert some control over Turners to influence it to package the asbestos more safely or with warnings, there is no policy justification for imposing liability. Moreover, another policy consideration is that Johnson might have claims against Turners and others (see *Jenkins v. T&N PLC* (1996) 45 Cal.App.4th 1224 [supplier of asbestos may be liable to plaintiff injured as a result of exposure to product containing asbestos]). Thus, this is not a situation where CertainTeed is " 'the only member of [the] enterprise reasonably available' " to Johnson. (See, e.g., *Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 479 [policies underlying strict products liability include a consideration whether the particular defendant is the only party available to the injured plaintiff and in the best position to ensure product safety].)

Johnson contends that *Vandermark, supra,* 61 Cal.2d 256 and *Peterson, supra,* 10 Cal.4th 1185 support a determination that strict liability applies in the present case. These cases, however, are unavailing.

Our Supreme Court in *Vandermark* held that the lower court erred in granting a nonsuit on the plaintiff's claim that Ford Motor Company (Ford) could not be strictly liable for a product defect simply because it relied on its dealers to make the final inspections, corrections, and adjustments necessary to make the cars ready for use. (*Vandermark, supra*, 61 Cal.2d at p. 261.) The court concluded that Ford, "as the manufacturer of the completed product, cannot delegate its duty to have its cars delivered to the ultimate purchaser free from dangerous defects, [and therefore] it cannot escape liability on the ground that the defect in [the plaintiff's] car may have been caused by

something one of its authorized dealers did or failed to do." (*Ibid.*)

The *Vandermark* court concluded that the lower court also erred in directing a verdict for the car dealership on the grounds that it was not liable for the personal injuries to the plaintiff from the defect in the car because it validly disclaimed the warranty liability for personal injuries in its contract with the plaintiff. (*Vandermark, supra,* 61 Cal.2d at p. 262.) The court explained that retailers, like manufacturers, "are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products." (*Ibid.*) The court elaborated: "In some cases the retailer may be the only member of that enterprise reasonably available to the injured plaintiff. In other cases the retailer himself may play a substantial part in insuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end; the retailer's strict liability thus serves as an added incentive to safety. Strict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants, for they can adjust the costs of such protection between them in the course of their continuing business relationship. Accordingly, as a retailer engaged in the business of distributing goods to the public, [the car dealership] is strictly liable in tort for personal injuries caused by defects in cars sold by it." (*Id.* at pp. 262-263.)

In *Vandermark,* both Ford and the car dealership had control over the cars. Ford manufactured the car and the dealership did the final inspections and completed any corrections. As already emphasized, if Johnson had presented evidence that CertainTeed had at any time control or influence over the packaging or shipping of the sacks of asbestos fiber, the present situation would be different and *Vandermark* would be more relevant. The dearth of any evidence establishing that CertainTeed could have or did have any influence or control over the packaging and shipping of the asbestos fibers distinguishes the case before us significantly from the facts in *Vandermark.*

Peterson, supra, 10 Cal.4th 1185, also is inapplicable. In *Peterson,* the Supreme Court held that landlords and hotel proprietors cannot be strictly liable under the doctrine of products liability to people leasing their residential dwelling and renting their hotel

rooms. (*Id.* at p. 1190.) The court explained: "A landlord or hotel owner, unlike a retailer, often cannot exert pressure upon the manufacturer to make the product safe and cannot share with the manufacturer the costs of insuring the safety of the tenant, because a landlord or hotel owner generally has no 'continuing business relationship' with the manufacturer of the defective product." (*Id.* at p. 1199.)

Johnson grasps onto the court's statement that there is no liability in the landlord situation because there is a " 'continuing business relationship' " (*Peterson, supra,* 10 Cal.4th at p. 1199) and points out that CertainTeed and Turners did have a continuing business relationship. Johnson maintains that, consequently, CertainTeed, unlike the landlord, should be subject to strict liability. We agree that a continuing business relationship favors the imposition of strict liability for a defective product, but this is just one factor we consider. A continuing business relationship, in itself, does not inevitably mean the defendant had some critical control over the design or distribution of the product. Many minor players may have a continuing business relationship with a manufacturer or supplier of a product without having any "integral and vital part in the overall production or marketing enterprise" (*Silverhart v. Mount Zion Hospital, supra,* 20 Cal.App.3d at p. 1026). Here, as repeatedly stressed, Johnson submitted evidence of a continuing business relationship but no significant evidence that CertainTeed was one of Turners's major purchasers or even that CertainTeed was a significant purchaser. The evidence in this record is simply that CertainTeed and Turners had entered into a series of contracts over a two-year span, but this was insufficient to raise an inference that CertainTeed had any control over the packaging and shipping of the product, especially since CertainTeed presented evidence that it did not.

Johnson argues that a defendant's control over the cause of the defect in the product is a significant factor, but not absolutely necessary. (See *Kasel v. Remington Arms Co., supra,* 24 Cal.App.3d at p. 725.) He argues that CertainTeed, as the owner of a product in the stream of commerce, is strictly liable to those injured. We disagree. Even if we presume that CertainTeed was the owner of the asbestos fiber at the time that Johnson was injured, ownership of a defective product in the stream of commerce does

not automatically trigger strict liability for that product's defect. As already stressed, liability for product defects "is not absolute." (*Anderson v. Owens-Corning Fiberglas Corp., supra,* 53 Cal.3d at p. 994.) The imposition of liability must support the policies underlying the doctrine. Here, other than spreading the cost for the defect onto a party that benefits from the use of the defective product, there is no policy reason to impose liability. In a case where the purchaser is a small entity and has no input into the manner in which the defective product is marketed, shipped, or distributed, the economic costs on the purchaser could be particularly burdensome. Moreover, "loss spreading is not the sole consideration in determining whether to impose strict liability for injuries resulting from a defective product." (*Peterson, supra,* 10 Cal.4th at pp. 1207-1208, citing *Brown v. Superior Court* (1988) 44 Cal.3d 1049.) Here, there is just no evidence in this record that CertainTeed played "an integral part" (*Vandermark, supra,* 61 Cal.2d at p. 262) in the producing, marketing, or shipping of the asbestos fiber and therefore it could not play any role in making the product safer. Under such circumstances, CertainTeed should not be subject to strict liability for product defect.

DISPOSITION

The judgment is affirmed. CertainTeed is awarded the costs of appeal.

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Lambden, J.

We concur:

_____
Kline, P.J.

_____
Haerle, J